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IN THE

Supreme Court of the United States

October Term, 1987

MARK POLLAK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Reply to Petition for a Writ of Certiorari

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REPLY TO PETITION FOR A WRIT OF CERTIORARI.

ARGUMENT IN SUPPORT OF DENIAL OF CERTIORARI.

Petitioner does not dispute the fact that he appeared before the County Court on November 2, 1984 as a probationer. As a probationer, he was in the legal custody of the court and therefore, under its supervision and control (N.Y. Crim. Proc., Section 410.50[1]). The law is well settled that one's status as a probationer places certain limits on his constitutional rights (*Morissey v. Brewer*, 408 U.S. 471, 489 [1972], and *Gagnon v. Scarpelli*, 411 U.S. 778, 781). Furthermore, probation revocation does not constitute a stage of a criminal prosecution (*Gagnon*, at 782).

Petitioner cites *Breed v. Jones*, 421

U.S. 519, to support his position that a probation revocation hearing followed by a criminal trial constitutes double jeopardy. It is the People's position that *Breed* can be distinguished from the instant case.

Breed deals with a situation in which a juvenile was first detained under the juvenile code and later convicted as an adult of the identical crime. In the instant case, the Petitioner was found to have violated a condition of his probation from an earlier Assault conviction, to wit: that the defendant not violate any federal, state or local law. Petitioner was subsequently convicted of the new criminal offenses, to wit: Criminal Sale of a Controlled Substance.

The sentence handed down by the Court for the probation violation re-

lated back to the original Assault charge. The Petitioner was not entitled to the "higher degree of protection" afforded to the juvenile in *Breed*. Cf. *Gagnon*, footnote 12, 789.

A probationer faces a dilemma when charged with a new crime. For example, he must choose between his right to testify at the violation hearing and his right to remain silent. It is, however, a dilemma based upon an established criminal record.

In addition, a probation violation hearing can be utilized by the defendant as a means of discovery, insofar as the People are obligated to produce at least part of their evidence from the upcoming trial. Furthermore, if the probationer so elects, he may move to adjourn that hearing until after the trial. In the

instant case, no such motion was made.

Lastly, the purpose of a sentence of probation is to allow eligible defendants an alternative to jail. If the theory of this defendant is followed to its logical conclusion, then the People must prosecute either the new crime or the probation violation. If such was the case, given the uncertainty of predicting future criminal behavior, the probation alternative would become extinct.

Respectfully submitted,

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